AG Communication Systems Corporation and Lucent Technologies, a single employer *and* International Brotherhood of Electrical Workers, Local 21, AFL–CIO and Communications Workers of America, AFL–CIO, Party In Interest. Case 33–CA–14450

June 29, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

I. INTRODUCTION

The principal issue presented is whether AG Communication Systems Corporation (AG) and Lucent Technologies (Lucent), alleged to be a single employer, violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to bargain with International Brotherhood of Electrical Workers, Local 21, AFL–CIO (IBEW Local 21), concerning the following decision and its effects: to integrate a bargaining unit of AG employees represented by IBEW Local 21 into a bargaining unit of Lucent employees represented by Communications Workers of America, AFL–CIO (CWA).

We find, for the reasons set forth below, that AG and Lucent comprised a single employer (the Respondent), and that the Respondent's management decision to integrate the two bargaining units was exempt from bargaining under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). We further find, however, that the Respondent failed to satisfy its duty to bargain with IBEW Local 21 concerning the effects of that decision, and thereby violated Section 8(a)(5) and (1) of the Act. Finally, we find, contrary to the dissent, that a remedy under *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), is unnecessary to ameliorate the effects bargaining violation in this case.[1]

[1] On August 12, 2005, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel and IBEW Local 21 each filed exceptions and a supporting brief, and AG and Lucent each filed an answering brief. AG and Lucent each filed cross-exceptions and a supporting brief, and the General Counsel and IBEW Local 21 each filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

II. FACTUAL BACKGROUND[2]

Lucent is engaged in the manufacture, sale, and installation of telephone switching equipment. In early 2003, it employed a bargaining unit of approximately 2700 telephone equipment installers represented by CWA. The most recent Lucent-CWA collective-bargaining agreement was effective from March 1, 2003, to October 31, 2004.

AG is a joint venture company created in 1989 by a corporate predecessor of Lucent and a corporate predecessor of Verizon. AG also is engaged in the manufacture, sale, and installation of telephone switching equipment. Its bargaining unit of approximately 250 telephone equipment installers was represented by IBEW Local 21. The most recent collective-bargaining agreement between AG and IBEW Local 21 was effective from October 1, 2000, to September 30, 2004. Telephone equipment installers employed by AG and Lucent performed basically the same type of work but on different telephone switching equipment.

The 1989 joint venture agreement that created AG required Lucent to purchase 100 percent of AG stock by December 31, 2003. By 2000, Lucent owned about 90 percent of AG stock. On February 3, 2003,[3] Lucent purchased the remaining AG stock, and thus owned AG in its entirety.

Immediately following the final purchase, Lucent took two key actions. First, Lucent circulated an internal memo setting forth its plan to integrate the AG installers, represented by IBEW Local 21, into a single bargaining unit with Lucent's installers, to be represented only by CWA.

Second, Lucent initiated efforts to completely integrate AG into Lucent's corporate structure; the goal was to increase profitability by streamlining operations and reducing redundancies. Thus, at Lucent's direction, joint teams of managers from Lucent and AG worked closely together to accomplish the integration. By April 1, most departments of AG were integrated into Lucent. Lucent assumed operational and budgetary responsibility for those departments, and AG managers either became Lucent employees or began reporting to counterparts at Lucent. In the meantime, within a few weeks of circulating its internal memo about its plans, Lucent advised CWA of those plans.

The integration of the AG telephone equipment installers into Lucent also began in early 2003, although the Respondent did not formally announce it until the summer of 2003. On July 17, Lucent notified IBEW Local 21 that, as of August 1, the telephone equipment installers employed by AG would be integrated into a single operational group with the telephone equipment

[2] The facts are set forth in the judge's decision and are summarized here.

[3] All dates hereafter are in 2003, unless otherwise noted.

installers employed by Lucent. Lucent further notified IBEW Local 21 that, as of August 1, all telephone equipment installers would be represented by CWA in a single bargaining unit covered by the Lucent-CWA collective-bargaining agreement. Finally, Lucent informed IBEW Local 21 that it would no longer be recognized as the representative of the AG equipment installers, and that "an accretion will have occurred."

On July 21, IBEW Local 21 requested bargaining with both AG and Lucent over the effects of the decision to merge the two bargaining units. Neither AG nor Lucent responded.

On August 1, the integration of the two bargaining units into a single unit represented by CWA was completed.[4] As of that date, telephone equipment installers who had been employed by AG became Lucent employees, and Lucent applied the terms of its collective-bargaining agreement with CWA to them. Thereafter, Lucent dealt exclusively with CWA as the bargaining representative of the former AG employees. Following August 1, Lucent bargained with CWA over the effects of the integration. Among other things, the seniority lists of the two bargaining units were dovetailed, so that former AG installers were accorded seniority dates with Lucent that reflected their service with AG.

III. THE JUDGE'S DECISION

The judge surveyed the bargaining landscape as of August 1, when Lucent completed the integration of the two bargaining units and AG ceased to exist as an operating entity. The judge concluded that on August 1 neither AG nor Lucent owed any bargaining obligation to IBEW Local 21, and he recommended that the complaint be dismissed in its entirety.

With respect to AG, the judge found that on August 1, AG no longer employed any telephone equipment installers, and thus had no duty to engage in bargaining with IBEW Local 21. The judge found that AG "simply had nothing to do with" the integration of the two bargaining units.

With respect to Lucent, the judge found that, as of the completion of the integration on August 1, it owed a bargaining obligation only to CWA, the representative of the integrated unit. Consequently, the judge also found that Lucent had no duty to bargain with IBEW Local 21, because it did not represent any of Lucent's telephone equipment installers. The judge did not address the Respondent's argument, discussed below, that its decision to integrate the two bargaining units was exempt from bargaining under *First National Maintenance Corp. v. NLRB*, supra, 452 U.S. 666.

[4] August 1 was also the official date on which AG ceased to exist as an operating entity, although the record shows that AG continued to exist as a "corporate shell."

Finally, the judge found that the single employer doctrine has "no relevance" to this case, because it applies only to two ongoing businesses being operated as a single entity. The judge reasoned that, as of August 1, only Lucent was operating, and AG no longer employed any telephone equipment installers.

IV. DISCUSSION

In his exceptions, the General Counsel states that his theory of this case is that Lucent and AG became a single employer *prior* to the integration of the bargaining units on August 1; and that *prior* to August 1, Lucent and AG, as a single employer, failed to bargain with IBEW Local 21 over that decision and its effects. As noted, the judge did not address the General Counsel's theory; instead, the judge focused on the situation as it existed on August 1, after the integration of the bargaining units was completed and AG ceased to exist.

For the reasons set forth below, we find that prior to August 1, Lucent and AG became a single employer, and that, as a single employer, they owed a duty to IBEW Local 21 to bargain over the effects of the decision to integrate the Lucent and AG bargaining units, but not over the decision itself.

A. Lucent and AG were a Single Employer

The Board's single-employer principles are well established. A single-employer relationship exists when two or more employing entities are in reality a single-integrated enterprise. As the Board has explained:

> Four criteria determine whether a single-employer relationship exists: (1) common ownership; (2) common management; (3) functional interrelation of operations; and (4) centralized control of labor relations. It is well established that not all of these criteria need to be present to establish single-employer status. Single-employer status ultimately depends on all the circumstances of a case and is characterized by the absence of an arm's-length relationship found among unintegrated companies. The Board has generally held that the most critical factor is centralized control over labor relations. Common ownership, while significant, is not determinative in the absence of centralized control over labor relations. [Footnotes and quotation marks omitted.]

Mercy Hospital of Buffalo, 336 NLRB 1282, 1283–1284 (2001).

Applying those principles to the facts before us, we find that the record establishes that Lucent and AG constituted a single employer by April 1, and certainly no later than July 17, when the Respondent informed IBEW Local 21 of the planned integration. Indeed, all four of the Board's single-employer criteria are present in this case.

The first criterion, common ownership, is clearly present. By February, Lucent had purchased 100 percent of AG stock.

The second criterion, common management, is also established. By April 1, Lucent had largely accomplished its effort to integrate AG's corporate structure and overall operations into its own. As the judge found, Lucent had assumed operational and budgetary responsibility for many, if not all, AG departments. In particular, AG's highest-ranking officers and managers, including its president, head of administration, and head of sales, had been replaced by Lucent personnel. AG's human resources director had begun reporting to a member of Lucent management.

The evidence of common management, moreover, was not limited to the upper echelons of AG's corporate hierarchy. On April 1, Lucent Vice President Barbara Landmann began managing the AG telephone equipment installers bargaining unit, with particular responsibility to oversee financial performance of the unit and to ensure that customer commitments were met. On that same date, AG's head of installation services, Dan Melsek, who had previously been responsible for overseeing the unit, became an employee of Lucent. Shortly thereafter, AG's two managers responsible for, respectively, telephone equipment installation services for the eastern and western United States began reporting to Lucent managers.

The record contains persuasive evidence of the third criterion supporting a single-employer finding—functional interrelation of operations between Lucent and AG. Primarily, this criterion is evidenced by the integration of most AG departments into Lucent effective April 1. As Lucent itself described the situation in an April 2 memorandum: "Organization Transition Managers from [Lucent] and [AG] have completed a joint effort to merge AG[] functions into Lucent effective April 1." In addition, we cite the following specific evidence from the record:

- On February 7, Lucent Vice President Landmann e-mailed the then-head of AG's installation services, Melsek: "Just wanted to make sure you know I mean that together, our teams will evaluate every opportunity that comes up regardless of customer to make sure we're in-sync on who has the deployment lead."
- Also on February 7, Lucent's senior director for operations and planning e-mailed Lucent Vice President Landmann about whether AG installers or Lucent installers should be assigned certain work, stating, "I think we should be careful here not to have it look like we [Lucent] sent the work to AG. It should appear as if the customer selected AG to perform the work."
- By February 24, the Lucent credit and loan administration group had assumed credit evaluation functions for AG, and the Lucent treasury department had initiated steps to become signatories on AG bank accounts.
- On March 10, Lucent's human resources director set a meeting between Lucent management and the AG human resources director "to review and determine who are the critical [AG] folks that need to be retained in the near term or until 1/1/04" and stated that Lucent's chief financial officer "has requested some number of headcount reductions by Mid-April across all of the AG functions."
- By April 1, the head of AG customer support had to check with someone from Lucent if he "wanted to do anything significant," as testified to by Stephen Muscat, Lucent's director of work force relations.
- Pursuant to decisions made by Lucent, AG scheduled training for Lucent telephone equipment installers at AG's offices during June, July and August.

The record thus shows a clear interrelation of operations between Lucent and AG.

Turning to the final criterion, centralized control of labor relations, the record shows that by April, Lucent, not AG, was making the critical decisions arising under the AG-IBEW Local 21 collective-bargaining relationship. The record establishes that Lucent accomplished this by dictating the conduct of AG's manager of labor relations, Patrick Murphy, who was ostensibly responsible for administering the collective-bargaining agreement between AG and IBEW Local 21. Lucent's control over Murphy extended to the failure to provide information to IBEW Local 21, to the layoff of AG installers, and, ultimately, to the matter of effects bargaining.

Murphy was aware in February of Lucent's decision to integrate the AG installers into a single bargaining unit with the Lucent installers represented by CWA. However, Lucent directed Murphy not to inform IBEW Local 21 of the integration, and Murphy followed Lucent's direction. Once Lucent completed its purchase of AG stock in February, IBEW Local 21 made a number of inquiries to Murphy about the effect on AG installers, and even filed a contractual grievance about the matter. Despite these inquiries, Murphy, pursuant to Lucent's direction, never informed IBEW Local 21 of the integration, even though the AG-IBEW Local 21 collective-bargaining agreement was still in effect.

Similarly, Lucent's significant control over AG's labor relations is demonstrated by evidence that Lucent effectively dictated the layoff of AG employees. The record shows:

- A February 4 Lucent memorandum entitled "AG Labor Policy" stated, inter alia, that prior to April 1, "AG should adjust its staffing to the appropriate level."
- As noted above, a Lucent memorandum of March 10 stated that Lucent's chief financial officer "has requested some number of head-count reductions by mid-April across all of the AG functions."
- On April 16, AG provided Lucent with a list of telephone equipment installers targeted to be laid off on May 3.
- Further, in a July 9 memorandum, Lucent Vice President Landmann informed the AG installation service managers for the eastern and western United States that she was not happy with AG financial results; that they had not taken sufficient action previously; and that, as a result, she was asking Lucent Vice President Davis to "step in and basically lead [Read: **dictate**] the downsizing exercise." [Brackets and bold in original.]

Finally, when Lucent announced in July that the AG installers would be merged into a single unit with the Lucent installers, AG did not independently respond to IBEW Local 21's request for effects bargaining. As Murphy explained in his testimony, "all decisions related to that were made by Lucent management, and [AG] management or residues of [AG] management, including myself, deferred any activities and correspondence related to those decisions to Lucent." Summing it up, Murphy admitted that "the decision not to negotiate . . . over the merger of Local 21 and its effects was a Lucent decision and *AG management simply followed the directions of Lucent*." (Emphasis added.) Lucent thus controlled AG's response on yet another key labor relations issue: whether to engage in effects bargaining.[5]

In summing up the essence of a single-employer relationship, the Board has observed that "[s]ingle employer status is characterized by the absence of an arm's-length relationship found among unintegrated companies." *RBE Electronics of S.D.*, 320 NLRB 80 (1995). Certainly, the evidence detailed above shows that by April 1, and certainly no later than July 17, Lucent and AG lacked an arm's-length relationship and therefore constituted a single employer.[6]

B. The Respondent's Duty to Bargain with IBEW Local 21

1. Decision bargaining

The Respondent argues in its exceptions that its decision to purchase AG in its entirety, close AG operations, and completely integrate all aspects of the two companies, including the two bargaining units, was a core entrepreneurial management decision exempt from bargaining under *First National Maintenance Corp. v. NLRB*, supra, 452 U.S. 666.[7] We find merit in the Respondent's exception.

In *First National Maintenance*, the Court held that the employer, which provided cleaning and maintenance services to commercial establishments, was not required to bargain with a union over its decision to discontinue operations at a nursing home and discharge its employees working there, after it was unable to secure an increase in its management fee. The Court reasoned that the employer's decision to shut down a part of its business constituted a significant "change in the scope and direction of the enterprise [which] is akin to the decision whether to be in business at all." Id. at 677. The Court held that bargaining over such management decisions, which directly affect employment but have as their focus economic profitability, should be required "only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." Id. at 679. In *First National Maintenance*, the Court concluded that the benefit of bargaining did not outweigh the burden placed on the employer's right to terminate part of its business for non-labor cost reasons. Accordingly, the Court held that the employer did not have a duty to bargain over that decision. Id. at 686.

The *First National Maintenance* test is applicable to determine here whether the Respondent had an obligation to bargain about its decision to integrate the two bargaining units. The Respondent's decision to shut down part of its business—all AG operations—and integrate the two companies, including the two bargaining units, had, as in *First National Maintenance*, a direct

[5] See *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1075 (1st Cir. 1981) (emphasizing importance of whether the controlling company possessed the "means to exercise its clout in matters of labor negotiations by its divisions or subsidiaries") (quoting *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1043 (8th Cir. 1976)).

[6] It is, of course, the Board's duty to take into account any countervailing evidence which might detract from our single-employer finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487–488 (1951). We have thus considered the conclusory testimony of certain of the Respondent's managers that Lucent had no control over the AG installers, and testimony that AG's two managers responsible for installation services for the eastern and western United States maintained responsibility over day-to-day operations of the AG installers. The probative value of this testimony, however, is far outweighed by all the evidence summarized above. See *Asher Candy, Inc.*, 348 NLRB No. 60, slip op. at 1 fn. 1 (2006).

[7] As noted above, the judge failed to address this argument.

impact on the employment of the former AG installers: their terms and conditions of employment would thereafter be controlled by a different collective-bargaining agreement. As in *First National Maintenance*, the Respondent's decision had as its focus the Respondent's economic profitability: to streamline operations and eliminate redundancies between the two companies. The question under *First National Maintenance* is whether the benefit of requiring the Respondent to bargain over the integration decision outweighs the burden placed on the conduct of the Respondent's business.

When labor costs underlie an employer's management decision, that decision is particularly amenable to the collective-bargaining process. The Supreme Court has emphasized that "a desire to reduce labor costs" is a matter "peculiarly suitable for resolution within the collective bargaining framework." *First National Maintenance*, supra, at 680, quoting *Fibreboard Paper Products v. NLRB*, 379 U.S. 203, 214 (1964). See, e.g., *Naperville Ready Mix v. NLRB*, 242 F.3d 744, 754 (7th Cir. 2001) (labor cost reduction is "precisely the kind of concern" that *Fibreboard* and *First National Maintenance* instruct is amenable to bargaining), cert. denied 534 U.S. 1040 (2001).

The record here shows that the Respondent's integration decision was not animated by a desire to reduce labor costs related to the telephone equipment installers. Indeed, neither the General Counsel nor IBEW Local 21 even argue that labor costs were lower under the Lucent-CWA collective-bargaining agreement than under the AG-IBEW Local 21 collective-bargaining agreement. Rather, the record supports the Respondent's assertion that the integration was motivated by its desire to increase profitability by merging duplicative corporate departments, and to secure the opportunity to sell a different type of telephone switching equipment to a new set of customers.

Moreover, the integration process involved large-scale organizational restructuring conducted by joint teams of Lucent and AG management. Requiring bargaining over the integration decision would place a significant burden on the Respondent's achievement of its comprehensive business reorganization.

Accordingly, we find that the burden on the conduct of the Respondent's business outweighs any benefit that might be gained from bargaining with IBEW Local 21 over its decision to integrate Lucent and AG, which encompassed the integration of the two units. The Respondent's integration decision is not suitable for resolution through collective bargaining because it lies at the core of the Respondent's entrepreneurial control and decision making. See *Fibreboard Paper Products v. NLRB*, supra at 223 (Stewart, J., concurring). We thus find that the integration was a management decision exempt from bargaining under *First National Maintenance.*[8]

2. Effects bargaining

In *First National Maintenance*, the Supreme Court also held that, even when an employer's decision to shut down part of its operations is exempt from bargaining, the employer is nevertheless obligated to bargain with the union over the effects of that decision. 452 U.S. at 681–682 and fn. 15. It is thus settled law that an employer's refusal to engage in effects bargaining over its decision to close part or all of its business violates Section 8(a)(5) of the Act. See, e.g., *Champion International Corp.*, 339 NLRB 672 (2003); *Willamette Tug & Barge Co.*, 300 NLRB 282 (1990); *Metropolitan Teletronics*, 279 NLRB 957 (1986), enfd. mem. 819 F.2d 1130 (2d Cir. 1987). Bargaining over the effects of such a decision "must be conducted in a meaningful manner and at a meaningful time." *First National Maintenance*, supra, 452 U.S. at 682.

The Respondent's decision to close part of its business fits squarely into the mold of management decisions requiring an employer to engage, upon union request, in effects bargaining. The Respondent closed AG, and concomitantly integrated AG's operations, including its installation operation, into Lucent's operations. The record shows that the Respondent never responded to IBEW Local 21's July 21 written request to bargain over the effects of the decision to merge the two installer bargaining units. On these facts, we find the conclusion inescapable that the Respondent, as a single employer, violated Section 8(a)(5) and (1) of the Act.

C. The Appropriate Remedy

The Board's standard remedy in effects bargaining cases is the remedy set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). See, e.g., *Liberty Source W, LLC*, 344 NLRB No. 137, slip op. at 2 (2005); *Kirkwood Fabricators*, 285 NLRB 33, 36–37 (1987), enfd. 862 F.2d 1303 (8th Cir. 1988). The *Transmarine* remedy requires that the employer bargain over the effects of its decision, and provide unit employees with limited backpay, from 5 days after the date of the Board's decision, until the occurrence of one of four specified conditions.

[8] Consistent with our finding that the Respondent was not obligated to bargain over its decision to integrate all telephone equipment installers into a single-bargaining unit represented by CWA, we also reject the General Counsel's contention that the Respondent's conduct on August 1 amounted to an unlawful withdrawal of recognition from IBEW Local 21. In this regard, we find *Holly Farms Corp.*, 311 NLRB 273, 277–278 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995), affd. 517 U.S. 392 (1996), relied on by the General Counsel, to be distinguishable. In that case, unlike here, there was no well-defined plan or timetable for achieving full functional integration of operations at the time the withdrawal of recognition occurred. 311 NLRB at 279.

Transmarine, supra at 390, as clarified in *Melody Toyota*, 325 NLRB 846, 846 (1998).[9]

A *Transmarine* limited bargaining order and backpay remedy is not awarded in every effects bargaining case, however. See, e.g., *National Terminal Baking Corp.*, 190 NLRB 465 fn. 1 (1971). Rather, in fashioning a remedy for an effects bargaining violation, the Board may consider any particular or unusual circumstances of the case. See, e.g., *Compact Video Services*, 319 NLRB 131 fn. 1 (1995), enfd. 121 F.3d 478 (9th Cir. 1997); *Willamette Tug & Barge Co.*, supra at 283.

We find that, under the unusual circumstances of this case, a limited bargaining and backpay remedy under *Transmarine* is not warranted. Under the facts here, no purpose would be served by ordering bargaining over the effects of the Respondent's integration of the AG telephone equipment installer unit into the Lucent telephone equipment installer unit, as there appears to be little or nothing over which to bargain. There is no contention that the terms and conditions of employment received by the former AG installers after their integration into the CWA-represented Lucent installer unit were in any way inferior to the terms and conditions of employment that they had received prior to the units' merger. Indeed, as noted above, the former AG installers' seniority was dovetailed with that of the Lucent installers, so that the AG installers received full credit for their employment with AG. Additionally, while the Board has held that "[e]ffects bargaining can include such topics as layoffs, severance pay, health insurance coverage and conversion rights, preferential hiring at other of the employer's operations, and reference letters for jobs with other employers,"[10] there is no basis in this case for effects bargaining over such topics related to loss of employment, because the former AG installers continued to be employed by the Respondent with full pay and benefits. Finally, the former AG installers continued to retain union representation after their integration into the Lucent unit, albeit representation by a CWA local rather than an IBEW local.

It is also significant that the Respondent bargained with CWA for many of the matters that would be the substance of bargaining with IBEW Local 21. A positive outcome for former AG installers was achieved. As a result of that bargaining, the seniority lists of the two units of installers were dovetailed, giving each former AG installer a seniority date with Lucent that reflected his service with AG. As the judge observed, had the Respondent been required to engage in effects bargaining with both CWA and IBEW Local 21, the former AG installers may well have received diminished seniority rights in light of the greater bargaining power of the larger CWA bargaining unit. These practical considerations cannot be ignored.

Given that the former AG installers suffered no detriment from the Respondent's failure to engage in effects bargaining over their integration into the Lucent installer unit and that there would be little or nothing over which to bargain if effects bargaining were ordered, imposition of a *Transmarine* bargaining order in this case is unwarranted. Further, inasmuch as the *Transmarine* monetary remedy is designed to help effectuate a bargaining order, a monetary remedy is likewise unwarranted here. Indeed, a backpay order would result only in a backpay windfall to former AG installers. Thus, we find that awarding a *Transmarine* remedy would serve no useful purpose in this case.[11]

We recognize that the Board is not the arbiter of the substantive terms of bargaining proposals. However, this is not to say that, in devising a remedy in this case, we are required to ignore CWA's bargaining achievements for those who were the victims of the earlier refusal to bargain with Local 21.

We further recognize the theoretical possibility that bargaining with IBEW Local 21 could have achieved additional benefits and protection for the AG employees. However, it is difficult to say what they would be. In addition, CWA is the Section 9(a) representative now, and we are concerned about the artificial imposition of a

[9] Bargaining must take place unless and until either: (1) the parties reach agreement; (2) the parties reach a bona fide bargaining impasse; (3) the union fails to request bargaining within 5 days of the Board's decision or to commence negotiations within 5 days of the employer's notice of its desire to bargain; or (4) the union ceases to bargain in good faith. See, e.g., *Melody Toyota*, 325 NLRB at 846.

[10] *Allison Corp*., 330 NLRB 1363, 1365 fn. 14 (2000).

[11] Our colleague, citing *Sea-Jet Trucking Corp.*, 327 NLRB 540, 549 (1999), rev. denied mem. 221 F.3d 196 (D.C. Cir. 2000), contends that a full *Transmarine* remedy is warranted even if the former AG bargaining unit "did better" being represented by CWA in effects bargaining. In *Sea-Jet,* however, unlike the present case, the employer moved to a new facility and refused to negotiate regarding, among other things, the union's demand for severance pay of employees who elected not to relocate. No other union bargained for severance for the employees. A *Transmarine* remedy was thus warranted notwithstanding that the employees who chose to relocate did not suffer any reduction in pay or benefits.

Likewise, in *Walter Pape*, 205 NLRB 719, 720 (1973), also cited by our colleague, a *Transmarine* remedy was warranted where it was not clear if all of the employer's laid-off employees had been hired by the company to which the employer had sold or subcontracted its distribution operations and there was only "some evidence" that those who had been hired were paid higher wages. As in *Sea-Jet*, no other union bargained for the employees about these matters.

Nor does *Comar, Inc*., 339 NLRB 903 (2003), relied on by the General Counsel, compel imposition of a *Transmarine* remedy here. In that case, in which the employer unlawfully failed to bargain over the effects of a plant closing, the Board extended a *Transmarine* backpay remedy to all unit employees, including those who had transferred to a nearby facility of the employer and did not lose any worktime. In *Comar,* however, unlike here, the unit employees who continued working for the employer suffered a loss of pay, as they received lower wage rates and benefits after their transfer.

second union on the scene.[12] Any agreement reached with IBEW Local 21 would likely be disruptive of the agreement reached between the Respondent and CWA, the extant representative.

In contending that a *Transmarine* bargaining and backpay is necessary here, our dissenting colleague emphasizes the fact that the Respondent refrained for several months from notifying IBEW Local 21 of its decision to integrate the AG installer unit into the Lucent installer unit and took steps to conceal this decision from Local 21, even though it had notified CWA, which represented the Lucent unit, of the decision. We do not condone the Respondent's conduct. The complaint, however, did not allege that the Respondent violated the Act by concealing its decision from IBEW Local 21 or that it engaged in bad-faith bargaining. Under the Act, the purpose of our remedy is not to punish a respondent for its misconduct, but to expunge the actual consequences of the unfair labor practice. See *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11–12 (1940). Accordingly, unlike our colleague, we would not award a *Transmarine* remedy on the basis of conduct not alleged or found to violate the Act.

For these reasons, we decline to award a limited bargaining order and backpay remedy under *Transmarine.* Rather, we shall limit the remedial relief in the circumstances of this case to ordering that the Respondent cease and desist its unlawful conduct and post an appropriate notice.

ORDER

The National Labor Relations Board orders that the Respondent, AG Communication Systems Corporation and Lucent Technologies, a single employer, Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to bargain in good faith with International Brotherhood of Electrical Workers, Local 21, AFL–CIO (IBEW Local 21), concerning the effects on employees represented by it of the Respondent's decision to integrate those employees into another bargaining unit of the Respondent's employees, represented by Communications Workers of America, AFL–CIO.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facilities in Chicago, Illinois, and any other base locations where it employs telephone equipment installers who were formerly employed by AG in the bargaining unit represented by IBEW Local 21, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Subregion 33, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceeding, the Respondent has gone out of business or closed the facilities involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 21, 2003.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not specifically found.

Dated, Washington, D.C. June 29, 2007

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting in part.

"Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims." *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956). This bedrock principle is embodied in Section 8(d) of the Act,[1] and has been recognized by the Board since its earliest days: "Interchange of ideas, communication of facts peculiarly within the knowledge of either party, personal persuasion and the opportunity to modify demands in

[12] There is no allegation that the Respondent's recognition of CWA as the representative of the former AG installers was unlawful.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] In relevant part, Sec. 8(d) states:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder.

accordance with the total situation" go to "the essence of the bargaining process." *S.L. Allen & Co.*, 1 NLRB 714, 728 (1936). Without honesty, collective bargaining as defined by the Act cannot take place. See *Truitt*, 351 U.S. at 152–153 ("If . . . an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.").

The Respondent contravened this fundamental principle by concealing from IBEW Local 21 the Respondent's decision to merge AG's telephone equipment installers, represented by IBEW Local 21, into a unit of Lucent's installers, and to grant exclusive representation of that unit to CWA. When the Respondent finally informed IBEW Local 21 of the imminent merger, IBEW Local 21 immediately requested bargaining over the effects of the decision, but received no response.

I join with the majority in all of its unfair labor practice findings, including the finding that the Respondent's refusal to engage in effects bargaining violated Section 8(a)(5) and (1) of the Act. In my view, however, in the circumstances of this case, a remedial cease-and-desist order and notice posting are simply inadequate to remedy that violation. The Board's core purpose to encourage and protect the process of collective bargaining compels the imposition of the full, traditional remedy for an effects-bargaining violation, as set forth in *Transmarine Navigation Corp.*, 170 NLRB 389, 390 (1968): the Board should order the Respondent to bargain with IBEW Local 21 over the effects of its decision, and to provide the former AG employees with a limited backpay remedy to ensure that meaningful bargaining takes place.

Background

The relevant facts are set forth in the majority's decision. Of particular importance to me is that, in February 2003,[2] as soon as Lucent embarked on its plan to integrate the two groups of employees, Lucent so advised CWA, whom it had decided would represent the merged unit. Yet neither Lucent nor AG provided any information about the plan to IBEW Local 21.

The failure to notify IBEW Local 21 of the impending integration was no oversight. As the judge found, the Respondent "purposely withheld" this information from IBEW Local 21 for some 5 months, until July 17. Lucent identified in early February that one of the "jeopardies" of its plan to integrate the units was that "IBEW may attempt to retain representation rights" by taking action before the NLRB. Accordingly, Lucent directed AG's labor relations manager, Patrick Murphy, not to inform IBEW Local 21 of the plan to integrate the bargaining units. Murphy assiduously abided by this directive.

Indeed, Murphy not only failed to notify IBEW Local 21 of the integration plan, but he also thwarted the legitimate attempts of IBEW Local 21 to learn about the plan. In February, IBEW Local 21 specifically asked Murphy about the effect of Lucent's purchase of AG on the IBEW-represented employees. Murphy gave no meaningful response.

IBEW Local 21 made further inquiries by expressly invoking its rights under its collective-bargaining agreement with AG. It appropriately directed those inquiries to Murphy, the management official responsible for administering the agreement. But those efforts were rebuffed, as well.

In early June, IBEW Local 21 learned that AG would be training Lucent installers on AG telephone switching equipment. IBEW Local 21 Business Representative Michael DeWitt notified Murphy via e-mail of his concern about AG's "intentions with respect to the Lucent employees after they have been trained." DeWitt expressly asked Murphy, "If there is a plan associated with this [training] please share it with me." Murphy responded that, other than for cross-training purposes, "I am unable to provide definitive information on management plans . . . for the use of the training."

Thereafter, by e-mail dated June 25, DeWitt notified Murphy that IBEW Local 21 viewed the training as an effort "on the Company's behalf to erode our jurisdiction of work under the current Collective Bargaining Agreement." DeWitt requested that a meeting "be arranged immediately between IBEW, yourself and any Lucent Manager with knowledge on this [training] issue to discuss the effects of this action" on the IBEW Local 21 bargaining unit.[3] Again, Murphy did not respond.[4]

Absent a response, DeWitt informed Murphy via e-mail on July 2 that IBEW Local 21 was filing a contractual grievance on the training matter, and he requested a third-step grievance meeting. In the e-mail, DeWitt also proposed the following settlement of its grievance:

[2] All dates are in 2003.

[3] By this time, AG and Lucent had become a single employer.

[4] Murphy's failure to respond was consistent with Lucent's ongoing directive that AG tell IBEW Local 21 as little as possible, as late as possible. In a June 27 e-mail from Lucent's work force relations director, Stephen Muscat, to the Lucent-AG integration team, Muscat bluntly stated: "as has been my concern all along . . . the less time they have the better for us," and relayed his further "concern" that giving IBEW Local 21 notice even on July 11 "will give them more than enough time to file an NLRB complaint." Muscat testified at the hearing as follows:

> Q: So timing [the notice for] July 17 would mean that it would provide them the least amount of time for the IBEW to file a charge and possibly for the NLRB to investigate it, isn't that correct?
>
> A: In part, yes.

> [S]upply [IBEW Local 21] with all pertinent plans and information on how the Lucent employees [trained on AG equipment] will be utilized in the Company's workforce.

Murphy replied on July 9 that the parties could meet on the matter on July 17, but he later canceled the meeting. Thus, after more than 5 months and numerous inquiries from IBEW Local 21, the Respondent still had not informed IBEW Local 21 of the impending integration of the AG and Lucent bargaining units.

Finally, DeWitt invoked IBEW Local 21's contractual right to meet on its grievance within 10 working days of its filing. On the 10th day, July 17, Lucent finally notified IBEW Local 21: (1) of its decision to integrate the bargaining units, which it intended to implement in full just 2 weeks later, on August 1; (2) that the integrated unit would be represented exclusively by CWA; and (3) that the Respondent would be withdrawing recognition from IBEW Local 21. On July 21, DeWitt requested in writing that AG and Lucent bargain with IBEW Local 21 over the effects of that decision. He received no response.

The Effects Bargaining Violation

The effects bargaining violation here is plainly established, as set forth above and in the majority opinion. IBEW Local 21, upon finally learning of the integration of the AG and Lucent bargaining units after months of concealment, promptly made a request to both AG and Lucent to bargain over the effects of that decision. It is undisputed that neither one responded, and that no effects bargaining with IBEW Local 21 ever occurred. The Respondent thus violated Section 8(a)(5) and (1) of the Act. See, e.g., *Asher Candy*, *Inc.*, 348 NLRB No. 60 (2006).[5]

Transmarine is the Appropriate Remedy

On the facts of this case, the majority's conclusion that a cease-and-desist order and notice posting are sufficient to remedy the bargaining violation is seriously flawed. The majority acknowledges that the traditional remedy when a Respondent fails to lawfully engage in effects bargaining is set forth in *Transmarine*, supra at 379. *Transmarine* requires that the employer bargain, on request, over the effects of its decision, and provide backpay from 5 days after the date of the Board's decision until the occurrence of one of four specified conditions.[6] That remedy is supported by nearly 40 years of Board and court precedent. See, e.g., *Kirkwood Fabricators, Inc. v. NLRB*, 862 F.2d 1303, 1307 (8th Cir. 1988).

The primary purpose of the *Transmarine* remedy is "to create an incentive for the Company to bargain in good faith." *Nathan Yorke v. NLRB*, 709 F.2d 1138, 1145 (7th Cir. 1983), cert. denied 465 U.S. 1023 (1984); accord: *O. L. Willis, Inc.*, 278 NLRB 203, 205 (1986). It is designed to recreate, in some practicable manner, a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent, as well as to make whole the employees for any losses suffered as a result of the violation. *Transmarine*, supra at 390. As the Seventh Circuit has stated, "[e]nsuring meaningful bargaining" by virtue of the *Transmarine* remedy "comports with the primary objective of the Act." *Nathan Yorke v. NLRB*, supra, 709 F.2d at 1145.

Achieving the objective of meaningful bargaining is particularly necessary in this case in view of the Respondent's deliberate and deplorable 5-month effort to conceal from IBEW Local 21 that its right to effects bargaining had been triggered. In *First National Maintenance*, supra, the Supreme Court made clear that "bargaining over effects must be conducted in a meaningful manner and *at a meaningful time*, and the Board may impose sanctions to insure its adequacy." Id. at 682. (Emphasis added.) In a case like this one, meaningful bargaining plainly requires "timely notice to the union" of the decision. *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 26 (1st Cir. 1983), cert. denied 464 U.S. 892 (1983). By concealing and withholding its decision from IBEW Local 21 for months, the Respondent utterly failed to provide timely notice, "thus denying the Union an opportunity to bargain at a time when the Union retained at least a measure of bargaining power." *Metropolitan Teletronics*, 279 NLRB 957, 959 (1986), enfd. mem. 819 F.2d 1130 (2d Cir. 1987) (finding that employer's belated offer to engage in effects bargaining after concealing relocation decision violated Sec. 8(a)(5), and imposing a full *Transmarine* remedy).[7]

To make matters worse, the record establishes that it was the Respondent's intention all along to minimize IBEW Local 21's ability to effectively represent the AG employees when they most needed such representation—

[5] The Respondent's duty to engage in effects bargaining on July 21 is not affected by the judge's finding—which is unnecessary to the disposition of this case—that the subsequent integration of the two units on August 1 resulted in a lawful accretion. "Accretion" is a legal conclusion that two previously separate groups of employees constitute one bargaining unit because there is little or no separate group identity and an overwhelming shared community of interest. See, e.g., *Northland Hub, Inc.*, 304 NLRB 665 fn. 1, 677 (1991), enfd. mem. 29 F.3d 633 (9th Cir. 1994). Even assuming that the August 1 integration constituted a valid accretion, the most that can be said is that the Respondent did not have any obligation to recognize and bargain with IBEW Local 21 from that point forward.

[6] See fn. 9, above. See also *Champion International Corp.*, 339 NLRB 672, 694 (2003).

[7] By the time the Respondent finally notified IBEW Local 21 of the imminent demise of the AG installers unit, IBEW Local 21 retained little, if any, appreciable bargaining power. As the coup de grâce, the Respondent then simply ignored the Union's request for effects bargaining.

at the time of their involuntary integration into Lucent.[8] In particular, the Respondent was determined to thwart IBEW Local 21 by denying it time to avail itself of the Board's processes. As described, in February 2003 Lucent perceived as one of the "jeopardies" to its plan that "IBEW may attempt to retain representation rights" by taking action before the NLRB. Accordingly, the Respondent took all necessary steps to conceal its plan and then to delay bargaining. As Lucent Manager Muscat explained to the members of the Lucent-AG integration team, "as has been my concern all along . . . the less [notice] time they have the better for us."

This case thus cries out for a full *Transmarine* remedy. The Respondent intentionally frustrated IBEW Local 21's right to engage in meaningful bargaining over the effects of the integration of the AG and Lucent installer units. The only practicable way to remedy the Respondent's misconduct is to now require the Respondent to engage in effects bargaining in accordance with *Transmarine*. Without a *Transmarine* remedy, IBEW Local 21 will have been effectively deprived of *any* opportunity to engage in bargaining and the Respondent will reap the benefits of its unlawful conduct.

The majority's rationale for denying a full *Transmarine* remedy is simply without valid foundation. The majority emphasizes that the Respondent engaged in effects bargaining with CWA, and opines that the former AG installers likely fared better with CWA representing them in that bargaining, as evidenced by CWA's preservation of their seniority. But that is simply no answer to the fact that the Respondent owed an effects bargaining obligation to IBEW Local 21, which was still the exclusive representative of the AG installers on July 17. The majority ignores the basic purpose of a Board remedial order: to "restore, so far as possible, the status quo that would have obtained but for the wrongful act." *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969). In this case, restoring the status quo requires ordering the Respondent to engage in effects bargaining with IBEW Local 21.

Moreover, contrary to the majority's suggestion, it is wholly irrelevant that the former AG bargaining unit employees achieved a "positive outcome" being represented by CWA in effects bargaining. It is not the Board's domain to "sit in judgment upon the substantive terms of collective bargaining agreements." *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952). Accordingly, under Board law, a full *Transmarine* remedy is warranted even if the former AG bargaining unit did *better* being represented by CWA. See *Sea-Jet Trucking Corp.*, 327 NLRB 540, 549 (1999), rev. denied mem. 221 F.3d 196 (D.C. Cir. 2000); *Walter Pape*, 205 NLRB 719, 720–721 (1973) (giving full *Transmarine* remedy even though employees secured employment with new company and it appeared that they were earning higher wage rates). The majority violates those principles here, essentially approving the bargaining results achieved by CWA and asserting them as a reason to relieve the Respondent of its bargaining obligation to IBEW Local 21.[9]

The majority also errs by relying on the possible "disrupti[on]" of the agreement between the Respondent and CWA as a reason for withholding full remedial relief from IBEW Local 21. In the first place, the majority gives no indication of what that disruption might consist; at this point, it is a "theoretical possibility," at best. In any event, the majority's hand-wringing over the Respondent's ability to fulfill its bargaining commitments to CWA is unpersuasive, given the majority's indifference to the Respondent's fulfillment of its like commitment to IBEW Local 21. The Board's concern must be with fully remedying the Respondent's wrongdoing. If that proves troublesome for the Respondent, it has only itself to blame. See *W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 767–770 (1983) (employer's "dilemma" of conflicting duties under an EEOC conciliation agreement and a collective-bargaining agreement was "of the Company's own making," and no defense to arbitration award against it).[10]

Finally, contrary to the majority's view, consideration of the Respondent's purposeful delay and concealment is fully warranted in devising an appropriate remedy here.[11]

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[8] The Respondent offers no legitimate explanation for its concealment of its plans from IBEW Local 21. This is not, for example, a case where emergency circumstances precluded timely notice and timely effects bargaining. Cf. *National Terminal Baking Corp.*, 190 NLRB 465 fn. 1 (1971) (citing the employer's demonstrated "pressing economic necessity" in not imposing a full *Transmarine* remedy). Indeed, Lucent gave notice to CWA as early as March 4, and at that time began discussing with CWA issues arising from the integration of the bargaining units.

[9] The majority's acknowledgement that "there was a theoretical possibility" that effects bargaining could achieve additional benefits for the AG employees does not fairly state the case. The Respondent did not engage in effects bargaining. Any benefit that the employees might have derived from it is, therefore, a "theoretical possibility"; in that sense, it is no different from any other bargaining that an employer or union unlawfully failed to engage in.

In any event, the majority's assertion that it is difficult to say what additional benefits the AG employees might have received is specious. The judge pointed out, for example, that the AG employees worked out of their homes, while the CWA contract required the employees to report to a central office location. Had effects bargaining taken place, IBEW Local 21 could have sought some compensation for the employees' new commuting expenses. This is only one of the possible benefits that IBEW Local 21 could have sought; the point being that it is not up to the Board, sitting in Washington, to determine whether or not bargaining might or might not have been beneficial to the employees.

[10] See also *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946) ("The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.").

[11] The majority's denial of a full *Transmarine* remedy is not premised on an assertion that the Respondent's conduct was de minimis. Indeed, the majority acknowledges that it does not "condone" the Re-

It is the primary responsibility of the Board to devise remedies that effectuate the policies of the Act, and the Board is vested with broad discretion in that determination. See, e.g., *Sure-Tan, Inc. v. NLRB*, 467 U.S 883, 898 (1984); *Fibreboard Paper Products v. NLRB*, 379 U.S. 203, 215–216 (1964). While the majority recognizes that it is the Board's practice to consider the unusual or particular circumstances of each case in fashioning a remedy for an effects bargaining violation, it simply refuses to face up to the key facts here. The Respondent's concealment was part and parcel of its refusal to engage in effects bargaining; the General Counsel's decision not to allege it as a separate violation does not preclude us from taking account of it in formulating an appropriate remedy.[12]

Conclusion

The Respondent's purposeful misconduct is an affront to the process of good-faith collective bargaining. The Board must not shrink from its obligation to protect this process. That can be accomplished here only by imposing a full *Transmarine* remedy, as the Board has done in effects-bargaining cases for nearly 40 years. Only in that manner will the Board fulfill its responsibility to apply remedies that promote the collective-bargaining process and, more broadly, effectuate the purposes of the Act. *Sure-Tan*, *Inc. v. NLRB*, supra at 898.

Dated, Washington, D.C. June 29, 2007

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail to bargain in good faith with International Brotherhood of Electrical Workers, Local 21, AFL–CIO (IBEW Local 21), concerning the effects on employees represented by it of our decision to integrate those employees into another bargaining unit of our employees, represented by Communications Workers of America, and to withdraw recognition from IBEW Local 21.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

AG COMMUNICATION SYSTEMS CORPORATION AND LUCENT TECHNOLOGIES, A SINGLE EMPLOYER

Nicholas Ohanesian and *Ava Pyrtel, Esqs,* for the General Counsel.
Michael F. McGahan and *Donald Kruger, Esqs. (Epstein, Becker & Green, P.C.),* of New York, New York, for Respondent Lucent Technologies.
Gerald A. Golden and *Jason Kim, Esqs. (Neal, Gerber & Eisenberg),* of Chicago, Illinois, for Respondent AG Communication Systems Corporation.
Gilbert A. Cornfield, Esq. (Cornfield & Feldman), of Chicago, Illinois, for Charging Party IBEW Local 21.
Theodore E. Meckler, of Cleveland, Ohio, for the Party-in-Interest, Communications Workers of America.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Chicago, Illinois, on April 4–8 and June 6–7, 2005. Local 21 of the International Brotherhood of Electrical Workers (IBEW) filed the charge on October 22, 2003, and the General Counsel issued a complaint, as a result of that charge, on August 31, 2004. The General Counsel alleges that AG Communication Systems Corporation[1] (AGCS) and Lucent Technologies were at all relevant times a single employer (Respondents). As such, the General Counsel alleges that they violated Section 8(a)(5) and (1) of the Act by merging AGCS' telephone equipment installers' bargaining unit, previously represented by the

spondent's flouting of the effects bargaining obligation owed to IBEW Local 21. Nor could it; it is the Board's fundamental duty to oversee and referee a fair process for collective bargaining. See *H.K Porter Co. v. NLR*B, 397 U.S. 99, 108–109 (1970); *McClatchy Newspapers v. NLRB*, 131 F.3d 1026, 1031 (D.C. Cir. 1997) (Board has "wide latitude to monitor the bargaining process").

[12] The General Counsel did, of course, allege a failure to engage in effects bargaining. There is nothing more he could have gained by also alleging the Respondent's concealment of its decision as an unfair labor practice. Moreover, it is not at all clear that there was any additional unfair labor practice to allege: Contrary to the supposition of the majority, concealing a management decision is not, in itself, an unfair labor practice, and the General Counsel did not allege bad-faith bargaining because there was, in fact, *no* bargaining.

[1] According to AGCS' brief, the Respondent's proper name is AG Communication Systems Corporation, rather than AG Communication Systems, Inc., as set forth in the complaint.

Charging Party, into a Lucent installers bargaining unit, represented by the Communications Workers of America (CWA), on August 1, 2003, and refusing to bargain with IBEW Local 21.

More specifically, the General Counsel alleges that the Respondents effectuated this merger without affording the Charging Party an opportunity to bargain over the decision to merge the bargaining units, or the effects of the merger. Respondents deny that they were a single employer at any time, and each contends that it had no obligation to bargain with the IBEW about the merger or its effects.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, AG Communications Systems Corporation, Lucent Technologies, and the Charging Party, IBEW Local 21, I make the following

FINDINGS OF FACT

I. JURISDICTION

AG Communications Corporation (AGCS) and Lucent Technologies were engaged in the manufacture, sale, and installation of telephone switching equipment prior to August 1, 2003. On that date, AGCS' installation services employees were integrated with Lucent's installation services organization. AGCS, so far as this record shows, was not engaged in the installation of telecommunications equipment after July 31, 2003.[2]

Respondents admit and I find that they were employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act at all times relevant to this matter, and that the Union, the International Brotherhood of Electrical Workers, Local 21, is and was at all relevant times a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Background

AG Communications Systems Corporation (AGCS) was created in 1989 as a joint venture between AT&T, a predecessor of Lucent, and GTE, a predecessor of Verizon.[3] Pursuant to the joint venture agreement, Lucent was obligated to purchase 100 percent of AGCS' stock by December 31, 2003. Lucent increased its ownership share of AGCS in stages. Lucent initially owned 49 percent of AGCS stock. This increased to approximately 80 percent in 1994 and to approximately 90 percent in 2000. Local 21, or its predecessor, IBEW Local 336, was apprised of each occasion that Lucent increased the percentage of its ownership of AGCS and was aware that by the end of 2003, Lucent would own 100percent of AGCS stock.

In late 2002 or early 2003, Lucent decided to accelerate the final phase of this purchase. On February 3, 2003, Lucent purchased the remaining 9.9 percent of AGCS stock. AGCS installation services employees were primarily engaged in the installation of AGCS' GTD5 switch, used principally by Verizon. Lucent installers primarily worked with Lucent's 5-ESS switch, which was sold to a variety of customers. Lucent sold 10–20 times as many switches as did ACGS, a much smaller company. Even before the completion of the stock purchase, Lucent decided that it was going to integrate the installation component of AGCS' business with its own installations services operation. The Lucent equipment installers were represented by the Communications Workers of America (CWA). In early 2003, Lucent informed AGCS and the CWA of its intention to merge the installation services operations and accrete the AGCS bargaining unit into the CWA-represented unit, but purposely withheld this information from IBEW Local 21 until 2 weeks before integration became effective on August 1, 2003.

The last collective-bargaining agreement between the IBEW and AGCS became effective on October 1, 2000, and expired by its terms on September 30, 2004. On July 17, 2003, Lucent Vice President William Schecter notified IBEW Local 21 that the installation services of Lucent and AGCS would be fully integrated on August 1, that AGCS installers would become members of the CWA bargaining unit on that date, and AGCS installers would be assigned to appropriate job titles under the CWA collective-bargaining agreement effective August 1. Schecter also informed IBEW Local 21 that "an accretion will have occurred" and that the IBEW would no longer be recognized as the collective-bargaining representative of the former AGCS installers.

On August 1, 2003, the installation work forces of Lucent and AGCS were completely merged. AGCS installers became employees of Lucent. As of that date, the CWA bargaining unit consisted of approximately 2700 employees who had been Lucent employees on July 31 and about 250 who had been employees of AGCS. When Lucent laid off hundreds of installers later in 2003 and in early to mid-2004, the layoffs were conducted under the CWA contract, pursuant to a seniority list that credited an employee's seniority with AGCS towards their seniority with Lucent. Fifty of the two hundred AGCS equipment installers who became Lucent employees on August 1, 2003, were laid off during this time period.

Lucent Involvement in AGCS' Business Prior to August 1, 2003

Due to the fact that I consider the Board's single-employer doctrine to be irrelevant to this case, I deem Lucent's involvement in AGCS' business prior to August 1, 2003, to be likewise irrelevant. However, I recite the facts in that the General Counsel and Charging Party consider it significant. Moreover, if higher authority disagrees with me, I hope to obviate the need for this case to be remanded for additional findings of fact.

In early 2001, AGCS did business with telephone companies, such as the Regional Bell Operating Companies, that it had not done business with before. Some of these customers required that AGCS be certified to perform installation services within their offices. AGCS did not have such certification, so while it was seeking the certification, it provided some of its installers and management employees with Lucent ID badges. These individuals were informed that when working with companies requiring certification, they would be working under the certification status of Lucent.

On February 20, 2001, AGCS District Manager David Peterson informed some AGCS installers that:

> Some of you will also be receiving Lucent badges in the near future. I will explain more about that in future e-mails. However, if I ask you to wear a Lucent badge to a site, do not wear AGCS shirts, AGCS badges, or any other AGCS attire. If we wear Lucent badges, it is because we are going to the

[2] See Respondent AGCS' answer to par. 2(a) of the complaint.

[3] In 1996, AT & T transferred its interest in AGCS to Lucent. In 2000 GTE merged with Bell Atlantic to form Verizon.

site as Lucent employees.
[GC Exh. 16.]

Two days later, Mitchell Bolnick, ACGS' director of business operations, informed Peterson by email that AGCS installers should wear both the AGCS and Lucent badges when working under the Lucent certification, AGCS Exh. 1. Pursuant to these instructions, on March 14, 2001, Petersen informed some of his installers that when working under the Lucent certification, they should wear the Lucent badge in front of and on the same clip as their ACGS identification badge, GC Exh. 7.

Some of these installers worked for customers in situations in which they wore a Lucent ID badge in 2001. When at least two installers became Lucent employees in August 2003, their new Lucent ID badge had the same photo and number as did the ID provided in 2001.

In September 2002, Theresa McCahill, a work force relations manager at Lucent, sent an e-mail to Patrick Murphy, labor relations manager at AGCS, inquiring about the status of a voluntary retirement offer that AGCS was making to employees represented by the Charging Party, and manufacturing employees represented by the International Association of Machinists (IAM). Murphy reported back to McCahill on the progress of his discussions with the IBEW and IAM in several e-mails. On September 26, 2002, he informed McCahill that AGCS would be proceeding with additional layoffs. McCahill passed this on to her superiors, including Ralph Craviso, head of Lucent's work force relations office, William Schecter and Stephen Muscat.[4] Two Lucent vice presidents, as well as a Verizon vice president, sat on the AGCS five-person board of directors. Jeff Siegel, the president of AGCS, who was also on the board of directors, reported to David Geary, Lucent's vice president for convergent solutions in his capacity as president. (Tr. 453).

However, the two companies generally operated independently from each other, including with regard to their labor policies. Eighty percent of AGCS' business pertained to the manufacture and installation of telephone switches for GTE equipment, owned in 2003 by Verizon. AGCS competed with Lucent with respect to the remaining 20 percent of its business.

Lucent Involvement in the Affairs of AGCS After
February 3, 2003

In January 2003, prior to the actual purchase of the remaining shares of AGCS stock, Lucent management decided that it would merge the AGCS equipment installer bargaining unit into the Lucent/CWA installer bargaining unit. Patrick Murphy, AGCS's human resources director, learned in February that Lucent had decided to merge the units. However, he never told the IBEW that the units were to be merged. I infer that Lucent directed Murphy not to inform the IBEW about the merger or accretion.

On February 4, 2004, Stephen Muscat, Lucent's work force relations director, sent a memorandum to Lucent Vice-President David Geary, entitled "AGCS Labor Policy," for approval (GC Exh. 21(a)). The memorandum set forth a plan to complete integration of the AGCS installers represented by the IBEW into the existing CWA/Lucent bargaining unit within approximately 60 days of the purchase of the remaining AGCS stock, on April 1, 2003. Prior to April 1, Muscat anticipated that "AGCS should adjust its staffing to the appropriate level."

Muscat's plan also called for negotiations with the CWA regarding the terms and conditions for integration of the AGCS installers into the CWA unit. He discussed the potential of an IBEW effort to retain its separate representation of former AGCS installers after the integration and suggested that the sooner integration was accomplished the more difficult it would be for the IBEW to be successful. Muscat also addressed potential issues in negotiating with the CWA. Returning to the Charging Party, he stated:

> Should the IBEW initiate a National Labor Relations Board proceeding (e.g., an election, a unit clarification petition, an unfair labor practice charge, etc.) our position will be that the new employees have been or soon will be accreted into the CWA bargaining unit.

On March 4, 2003, Muscat called Staff Representative Robert Richhart of the CWA to discuss the merger of the installation employees into the CWA unit. They discussed a number of subjects including cross-training of Lucent and AGCS installers, integration of the AGCS and Lucent seniority lists and the possibility of providing enhanced layoff protection to at least some AGCS installers with experience with that company's GTD5 switch. Neither AGCS nor Lucent provided IBEW Local 21 with information regarding the decision to merge the two bargaining units until July 17, 2003, 2 weeks before it was effectuated.

On April 1, 2003, Lucent organizations assumed operational and budgetary responsibility for many, if not all, AGCS organizations. Some AGCS managers became employees of Lucent and others, who remained employees of AGCS, began reporting to counterparts at Lucent. Danny Conner, who was in charge of AGCS installation services in the eastern part of the United States began reporting to Lucent Manager Chris Camacho. Steve Page, who was in charge of AGCS installation services in the west, began reporting to Lucent Manager Denise Putz. Rank-and-file installers continued to report to their AGCS supervisors and had no contact with Lucent supervisors or management.[5] Lucent was monitoring the operation of AGCS very closely during the spring and summer of 2003. For example, AGCS provided Lucent with a list of installers targeted to be laid off on May 3, 2003.

Also between April 1 and August 1, 2003, Barbara Landmann, then Lucent's vice president for deployment services in North America, began to oversee and manage the AGCS installer unit "from the perspective of insuring that AGCS met all their customer commitments in a high quality way." She also oversaw AGCS' financial performance (Tr. 562).

On the basis of financial reports submitted by AGCS to Lucent's chief financial officer, Landmann, determined that AGCS had too many resources to support the amount of revenue that Lucent and AGCS were forecasting for the future. On July 9, 2003, Landmann designated a Lucent employee, Jesse "Lamar" Davis to lead a downsizing exercise for AGCS (GC Exhs. 31, 37). She directed the installation unit managers at AGCS (Conner and Page) and at Lucent (Camacho and Putz) to work with Davis on this exercise. Apparently, no additional

[4] Muscat reports to Schecter, who reports to Craviso.

[5] Some rank-and-file AGCS employees also became employees of Lucent on April 1. These included the professional engineers, who were not represented by the Charging Party.

downsizing occurred until after August 1.

The target date for complete integration of the installer units was pushed back several times. Lucent contends these delays were due to such difficulties as merging the AGCS order system and other processes into the Lucent system. Steve Muscat wrote to other members of the Lucent integration team on May 2, 2003, regarding his concern about the possibility of having to deal with a wage reopener provision in the IBEW's collective-bargaining agreement if integration did not occur before September 2003.

Lucent began training some AGCS installers on its products, including the 5-ESS switch, in June. Pursuant to decisions made by Lucent, AGCS scheduled training for 16 Lucent installers at AGCS' offices in Phoenix, Arizona, during July and August. (GC Exh 8.) Some of this training pertained to the installation of AGCS' GTD5 switch. The IBEW filed a grievance over this training. On July 17, 2003, the IBEW requested arbitration of the grievance. AGCS did not respond to the request. The cross-training of Lucent and AGCS installers was not completed by August 1, 2003, and continued for some time after that date.

As mentioned earlier, on July 17, William Schecter, Lucent vice president for work force relations, sent a letter to IBEW Business Representative Michael DeWitt informing the IBEW for the first time of Lucent's intention to merge the installation services of AGCS and Lucent. Schecter asserted that an accretion will have occurred on August 1, 2003, and therefore "the IBEW can no longer be recognized as [the former AGCS' installers] collective bargaining representative. In addition, effective on that date, union dues will no longer be tendered to the IBEW, either by Lucent or AGCS."

DeWitt responded to Patrick Murphy, AGCS' human resources director, and sent a courtesy copy to Schecter. In his first letter of July 21, 2003, DeWitt offered, on behalf of Local 21, to submit the decision to merge the bargaining units to binding arbitration. He proposed that if the arbitration could not be completed in 2 weeks, that the merger of the bargaining units be postponed. Neither AGCS nor Lucent responded.

DeWitt wrote a second letter (GC Exh. 13) to Murphy and Schecter on July 21, 2003, requesting bargaining over the effects of the decision to merge the installation bargaining units. He also stated that the IBEW was not waiving its position that the decision itself violated Local 21's rights under its collective-bargaining agreement with AGCS. Neither Lucent nor AGCS responded to this letter. On August 1, 2003, Local 21's former bargaining unit members became Lucent employees. Lucent dealt exclusively with the CWA as their bargaining representative.

Lucent Vice President Schecter also wrote to the CWA on July 17, imparting the same information conveyed to the IBEW about the forthcoming merger and accretion. He requested a meeting with the CWA to resolve a number of issues regarding the appropriate treatment of the soon-to-be accreted AGCS installers, Lucent Exhibit 22. After August 1, Lucent and the CWA in fact bargained over the effects of the accretion, such as the integration of the AGCS and Lucent seniority lists. (Tr. 758–759.)

Effective August 1, 2003, Lucent applied the terms of its collective-bargaining agreement with the CWA to the former AGCS installers. They were given new job classifications and benefit packages that were consistent with the CWA contract and, at least in most cases, a new supervisor and a new base location. Starting on August 1, 2003, the supervision of former AGCS installers and installers who had worked for Lucent before August 1 was completely integrated. Some AGCS installers worked for supervisors who had been Lucent supervisors prior to August 1. Some Lucent installers worked for supervisors who had been AGCS supervisors prior to August 1. Under AGCS' contract with the IBEW, installers were based at their homes. Under the CWA contract they were assigned to a central office location as were those installers who worked for Lucent prior to August 1. (Tr. 568–571.)

Analysis

Was Lucent Entitled to Merge the Former AGCS Installers with its Installers and Accrete Them into the CWA Bargaining Unit?

The term "accretion" generally refers to the addition of employees into a bargaining unit without an election. The Board set forth the fundamental principles regarding accretion in a number of cases, including a very recent decision *Frontier Telephone of Rochester,* 344 NLRB No. 153 (2005); and *Northland Hub, Inc.,* 304 NLRB 665, 677–679 (1991), enfd. 29 F.3d 633 (9th Cir. 1994), a case which is factually somewhat similar to the instant matter.[6]

The Board has long followed a restrictive policy in determining whether the addition of a new group of employees to an existing bargaining unit is proper because such an accretion forecloses the basic right of the new group of employees to select their bargaining representative. The Board will not, under the guise of accretion, compel a group of employees, who may constitute a separate appropriate unit to be included in an overall unit without allowing those employees the opportunity to express their preference. On the other hand, the accretion doctrine "preserves industrial stability by allowing adjustments in bargaining units to conform to new industrial conditions without requiring an adversary election every time new jobs are created or other alterations in industrial routine are made, *NLRB v. Stevens Ford, Inc.,* 773 NLRB 468, 473 (2d Cir. 1985).

Generally, a valid accretion has been found only when the additional employees have little or no separate group identity and thus cannot be considered to be a separate appropriate unit and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted. In determining whether an accretion is warranted, the Board considers integration of operations, centralized control of management and labor relations, geographic proximity, similarity in terms and conditions of employment, similarity of skills and functions, physical contact among employees, collective-bargaining history, degree of separate daily supervision, and degree of employee interchange. The most critical factors are employee interchange and common day-to-day supervision. The latter is particularly significant since the day-to-day problems of employees at one location may not necessarily be shared by employees who are separately supervised at another location. *Frontier Telephone of Rochester,* supra.

As of August 1, 2003, all installers working for Lucent, in-

[6] In *Northland Hub*, as in the instant case, bargaining unit employees continued to be employed immediately after the accretion and continued to be represented by a labor organization.

cluding the former AGCS installers, shared common working conditions and terms of employment. Even more importantly they worked for the same supervisors. The only distinction between the former AGCS installers and the former Lucent installers that survived the merger is that some former AGCS installers had expertise in working with the GTD-5 switch that many installers who had never worked for AGCS did not have. Similarly, since cross-training continued after August 1, many former AGCS installers lacked expertise in installing Lucent products on the date of the merger. I deem this to be an insufficient basis for concluding that the former AGCS installers retained a sufficient separate identity to render their accretion into the CWA unit invalid.[7] Moreover, Lucent began operating on August 1, 2003, pursuant to a well-defined plan to render the former AGCS installers fungible with those who had worked for Lucent previously.

The Board stated in *Holly Farms Corp.,* 311 NLRB 273, 279 (1993), that, "in determining whether accretion is proper, unless there is a well-defined plan or timetable for achieving full functional integration of operations, the changed nature of the operation should be assessed at the time the withdrawal of recognition occurred." This suggests that the Board will find that an accretion is proper on the basis of a well-defined plan for full functional integration of operations in situations in which this degree of integration has not been achieved by the time of withdrawal. I find that in the instant case, Lucent had a well-defined plan for integration of AGCS and Lucent installation services, which it acted upon in instituting the cross-training of AGCS and Lucent installers prior to the merger. Therefore, Lucent was entitled to accrete the AGCS unit into the Lucent/CWA unit on August 1, 2003—even if the AGCS installers retained a separate identity as of that date. Thus, I conclude that Lucent had no obligation to bargain with the IBEW regarding the merger of the installation units or its effects.

Practical considerations also support this result, as well as demonstrate the overwhelming community of interest between the former AGCS installers and the preexisting bargaining unit. Lucent bargained about the merger and its effects with the CWA. The seniority lists of the installers were dovetailed so that AGCS installers were accorded a seniority date with Lucent which reflected their service with AGCS. The CWA had an obligation to represent the former AGCS installers fairly after August 1, 2003. Had Lucent been required to bargain with both the CWA and the IBEW, it is possible that both unions may have bargained for preferential treatment of their installers. Since the CWA unit had more negotiating power given the size of its unit, it is conceivable that the former AGCS installers may have ended up in a much worse position than they in fact did.

AGCS was not Required to Bargain Over Lucent's Decision to Merge the Installer Bargaining Units and its Effects.

As of August 1, 2003, AGCS was no longer the employer of any equipment installers. It simply had nothing to do with the integration of its former employees with the preexisting unit of Lucent installers.[8] Moreover, even if AGCS and/or Lucent had an obligation to bargain with the IBEW, there would be no remedy due either the IBEW or the former AGCS employees. Up until August 1, 2003, AGCS employees received whatever benefits were due them under the IBEW's collective-bargaining agreement with AGCS. Since a valid accretion occurred on August 1, 2003, these employees were not subject to that agreement as of that date.

The Single-Employer Issue

The General Counsel and IBEW argue that for purposes of this case Lucent and AGCS are a single employer. Thus, they contend that one or both, separately or together, had an obligation to bargain with the IBEW with regard to the decision to integrate the Lucent and AGCS installer units and to accrete the AGCS unit into the Lucent/CWA unit. They also contend that Lucent and/or AGCS were obligated to bargain regarding the effects of the merger/accretion.

I conclude that the single-employer doctrine has no relevance to this case. The Board applies this concept in situations in which it wishes to treat two ongoing businesses as one–on the ground that they are owned and operated as a single unit, *Johnstown Corp.,* 322 NLRB 818 (1997); *NLRB v. Hospital San Rafael, Inc.,* 42 F.3d 45 (lst Cir. 1994).

The reason the single-employer doctrine has no applicability to this case is that as of August 1, 2003, AGCS no longer employed any equipment installers.[9] On August 1, all the equipment installers who had formerly worked for AGCS were employed by Lucent. The only issue in this case is whether or not Lucent could accrete the former AGCS installers into the Lucent/CWA bargaining unit on that date.[10]

On August 1, 2003, Lucent owned 100 percent of AGCS. Lucent was operating its installation services as a single entity, rather than operating the former AGCS installation services separately. Lucent was required by Section 8(a)(5) to negotiate with the bargaining representative of its affected employees as to the effects of its decision to operate its installation services as a single entity. The issue herein is simply who was that representative or representatives. Having found that Lucent properly deemed the former AGCS installers to have been accreted into the CWA bargaining unit, it was obligated to bargain over the effects of the merger with the CWA, but not with IBEW Local 21, which did not represent any of its installers.

On these findings of fact and conclusions of law and on the

[7] Furthermore, even if I am incorrect, it would be inappropriate for the Board to order either Lucent or AGCS to bargain with the IBEW prospectively if the former AGCS installers have lost their separate identity since August 1, 2003. Moreover, any backpay or make-whole remedy should be tolled as of the date that this separate identity ceased to exist. *Northland Hub, Inc.,* 304 NLRB 665 fn. 1 (1991).

[8] I reject AGCS' argument that the IBEW bargained over the effects of the merger in 2000. Art. 20 of the 2000–2004 collective-bargaining agreement, entitled, "Successor/Cessation of Bargaining Unit Operations," on which AGCS relies, is ambiguous as to whether it applies to the instant situation. I note that this article states that it does not refer to "any changes that result from corporate reorganizations and restructuring or from the sale or other transfer of some or all of the Bargaining Unit Operations." Moreover, as the IBEW points out, AGCS took none of the measures required of it by art. 20 with respect to the merger of its installation services unit with that of Lucent.

[9] Thus, the allegation in complaint par. 6(a) that Respondent integrated the installers employed by AGCS into an installer bargaining unit employed by Lucent, is inaccurate.

[10] Even if AGCS and Lucent were a single employer of the equipment installers on August 1, 2003, it does not necessarily follow that these installers constituted either a single or two separate appropriate bargaining units, *South Prairie Construction Co. v. Operating Engineers Local 627,* 425 U.S. 800 (1976).

entire record, I issue the following recommended[11]

ORDER

The complaint is dismissed.

Dated, Washington, D.C., August 12, 2005

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.